Boonsom Boonyanit v Adorna Properties Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-268-1995
GOPAL SRI RAM, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
17 MARCH 1997

Land Law *— Indefeasibility of title and interests — Forged transfer — Whether registration of title resulting from forgery is indefeasible — Whether third party purchaser for good faith has indefeasible title — Whether indefeasibility under s 340 is deferred or immediate — National Land Code 1965 s 340*

Evidence *— Burden of proof — Forgery of signature — Quantum of proof — Whether criminal standard of beyond reasonable doubt applies to civil forgery suits*

The appellant was a Thai national who owned property ('the property') in Penang. An unknown person, claiming to be the appellant, procured a certified true copy of the appellant's land title from the National Land Registry by claiming to have lost the original documents and subsequently procured a forged passport in the appellant's name, and duly sold the property to the respondent for valuable consideration. The appellant discovered the ruse but only after the respondent was registered as owner of the property.

The appellant sued the respondent in the High Court to have her restored on the register as the owner of the property and for a declaration that the respondent's title was void ab initio. She put forth evidence that at the time of the sale, she always had the original documents of title in her possession, she was in Thailand and had not left the country, that her own passport was genuine and the one which was shown to the respondent was a fake, and that the signature on the memorandum of transfer was not hers, all of which were corroborated by her son. The respondent argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s 340 of the National Land Code Act 1965 ('the Code'). The judge ruled in favour of the respondent, stating that the appellant had failed to prove the forgery beyond a reasonable doubt, as she had put forth only circumstantial evidence of the forgery and furthermore did not have a handwriting expert to testify on her behalf. He also ruled that even if she had proven the forgery, the respondent's title was immediately indefeasible by virtue of s 340 of the Code (see [1995] 2 MLJ 863).

The appellant appealed, basing her arguments on the trial judge's application of the wrong standard of proof for civil forgery and also that s 340 of the Code created a deferred, not immediate, indefeasible title in a third party purchaser. The respondent argued that s 340 created an immediate indefeasible title as the words 'any purchaser' were present in the section and their plain meaning supported immediate indefeasibility of title. The respondent also cross-appealed, complaining

A that the trial judge had ruled that the proof of each document tendered by the appellant was to be tested only at the end of the trial and not at the point in time when it was tendered, and hence that the trial judge had not tried the issue of forgery regularly.

B **Held**, allowing the appeal:

(1) The standard of proof to be applied in civil forgery suits is the balance of probabilities. The approach adopted by the trial judge in the present case of applying a standard of beyond reasonable doubt is against binding precedent and thus wrong (see pp 74C–E and 77C); *United Asian Bank Bhd v Tai Soon Heng Construction* C *Sdn Bhd* [1993] 1 MLJ 182 followed.

(2) The trial judge had failed to judicially appreciate the nature and quality of evidence led at trial. The appellant had clearly established on a balance of probabilities that the signature on the memorandum of transfer was forged. The trial judge's failure to D recognize the distinction between direct and circumstantial evidence was a serious misdirection that had occasioned a miscarriage of justice in this case. He erred in his reliance upon the appellant's failure to call certain witnesses as she was not obliged to call the witnesses and had clearly established forgery with the evidence she tendered. The Court of Appeal had the E discretion to substitute its views in cases where to allow the trial judge's views to stand would amount to a miscarriage of justice and, in this case, the substitution of the views was appropriate and just (see pp 81D, 79G–H, 80C and 81E–I); *PP v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 and *Onassis & Calogeropoulos* F *v Vergottis* [1968] 2 Lloyd's Rep 403 followed.

(3) The respondent's complaint that the issue of forgery was not regularly tried was dismissed as the complaint was with the mode of proof, not the admissibility of the documents. From a procedural standpoint, the judge correctly dealt with the evidence, G and it was up to the respondent to raise objections to the mode of proof at the earliest possible stage. Failure to do so results in the point being no longer open at the appellate stage (see p 73A–B); *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124 and *Gopal Das & Anor v Sri Thakurji & Ors* AIR 1943 PC 83 followed.

H (4) The words 'any purchaser' in s 340 of the Code refers to a subsequent and not to an immediate purchaser, hence creating a deferred indefeasibility which benefits subsequent purchasers. The title of an immediate purchaser is defeasible if tainted by one or more of the vitiating elements set out in s 340(2) but I creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor. This bifurcation makes it clear that Parliament intended to confer deferred and not immediate indefeasibility. The trial judge erred in his reliance upon the case *Frazer v Walker* which turned upon the construction

of a particular New Zealand provision which is fundamentally different in wording from s 340 of the Code. On a proper construction of s 340, a registration obtained by forgery is of no effect. When s 340 is read as a whole and in context with ss 292 and 304 of the Code, it is clear that there can be no registration without an instrument. Hence, one of the ways in which to defeat a registration is by impugning the very instrument of transfer by means of which the registered proprietor obtained his title. If the instrument was forged or by other reason was insufficient or void, the title of the registered proprietor may be set aside. The differences between the wording of the old s 42(iii) of the Land Code (Cap 138) and s 340(2)(b) does not produce any difference in consequence, even though the former more clearly sets out that a registration obtained by forgery is void (see pp 84E–F, 87D–E, 84C–D and 85A–C, G–H); *Frazer v Walker* [1967] 1 AC 569 distinguished, *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 not followed, *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 and *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 followed.

[Bahasa Malaysia summary

Perayu merupakan seorang warganegara Thai yang memiliki harta ('harta tersebut') di Pulau Pinang. Seorang yang tidak dikenali, yang mendakwa dia adalah perayu, telah memperolehi sijil yang diakui sah ke atas hakmilik tanah perayu daripada Pejabat Pendaftaran Tanah Negara dengan menuntut bahawa dia kehilangan dokumen asal dan ekoran itu telah memalsukan pasport dalam nama perayu, dan kemudiannya menjual harta tersebut kepada penentang untuk balasan bernilai. Perayu mendapat tahu akan muslihat itu tetapi hanya selepas penentang didaftarkan sebagai tuan punya harta tersebut.

Perayu mendakwa penentang di Mahkamah Tinggi agar dia dikembalikan atas daftar sebagai tuan punya harta tersebut dan untuk suatu perisytiharan bahawa hakmilik penentang adalah tak sah ab initio. Dia mengemukakan keterangan bahawa pada masa jualan berlaku, dia sentiasa mempunyai dokumen hakmilik yang asal dalam miliknya, dia berada di negara Thai dan tidak meninggalkan negara itu, bahawa pasportnya adalah yang asal dan yang ditunjukkan kepada penentang adalah yang palsu, dan bahawa tandatangan atas memorandum pindahmilik bukanlah tandatangannya, yang mana kesemuanya telah disokong oleh anak lelakinya. Penentang berhujah bahawa sebagai pembeli pihak ketiga yang ikhlas untuk nilai, hakmiliknya adalah tak boleh disangkal meskipun terdapat tandatangan palsu atas memorandum pindahmilik dan bergantung pada s 340 Kanun Tanah Negara 1965 ('Kanun tersebut'). Hakim membuat keputusan yang memihak kepada penentang, dan menyatakan bahawa perayu telah gagal membuktikan pemalsuan melampaui keraguan munasabah, oleh kerana dia hanya mengemukakan keterangan ikut keadaan tentang pemalsuan dan seterusnya tidak

meminta pakar tulisan tangan memberi keterangan bagi pihaknya. Beliau juga memutuskan bahawa jika pun perayu telah membuktikan pemalsuan itu, hakmilik penentang dengan segeranya adalah tak boleh disangkal memandang kepada s 340 Kanun tersebut (lihat [1995] 2 MLJ 863).

Perayu membuat rayuan, dengan mendasarkan hujahnya atas pemakaian darjah pembuktian pemalsuan sivil yang salah oleh hakim perbicaraan dan juga bahawa s 340 Kanun tersebut mewujudkan hakmilik tak boleh disangkal tertunda, dan bukan hakmilik tak boleh disangkal segera, dalam pembeli pihak ketiga. Penentang berhujah bahawa s 340 mewujudkan hakmilik tak boleh disangkal segera kerana perkataan-perkataan 'mana-mana pembeli' terdapat dalam seksyen itu dan makna nyata mereka menyokong ketakbolehan disangkal hakmilik segera. Penentang juga telah membuat rayuan balas, dengan mengadu bahawa hakim perbicaraan telah memutuskan pembuktian setiap dokumen yang dikemukakan oleh perayu akan diuji hanya di penghujung perbicaraan dan bukan ketika ia dikemukakan, dan justeru itu hakim perbicaraan tidak membicarakan isu pemalsuan mengikut aturan.

Diputuskan, membenarkan rayuan:

(1) Darjah membukti untuk dipakai dalam guaman pemalsuan sivil adalah imbangan kebarangkalian. Pendekatan yang diterima-pakai oleh hakim perbicaraan dalam kes ini iaitu darjah melampaui keraguan munasabah bertentangan dengan duluan yang mengikat dan oleh itu adalah salah (lihat ms 74C–E dan 77C); *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 diikut.

(2) Hakim perbicaraan telah gagal menilai secara adil sifat dan mutu keterangan yang dikemukakan di perbicaraan. Perayu telah membuktikan dengan jelas atas imbangan kebarangkalian bahawa tandatangan atas memorandum pindahmilik adalah palsu. Kegagalan hakim perbicaraan untuk mengecam perbezaan antara keterangan langsung dan keterangan ikut keadaan merupakan salah arah serius yang telah menyebabkan salah laksana keadilan dalam kes ini. Beliau tersilap dalam bergantung kepada kegagalan perayu untuk memanggil saksi tertentu sebab dia tidak wajib memanggil saksi dan telah pun membuktikan pemalsuan dengan jelas melalui keterangan yang dikemukakan olehnya. Mahkamah Rayuan mempunyai budi bicara untuk menggantikan pendapat dalam kes di mana jika pendapat hakim perbicaraan dibiarkan ianya sama seperti menyebabkan salah laksana keadilan dan dalam kes ini mahkamah berpandangan penggantian pendapat adalah wajar dan adil (lihat ms 81D, 79G–H, 80C dan 81E–I); *PP v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 dan *Onassis & Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 diikut.

(3) Aduan penentang bahawa isu pemalsuan tidak dibicarakan mengikut aturan ditolak sebab aduan adalah berhubung dengan cara membukti,

dan bukan kebolehterimaan dokumen-dokumen. Dari pandangan prosedur, hakim telah membicarakan keterangan dengan betul, dan penentang bebas untuk menimbulkan bantahan kepada cara membukti di tahap yang paling awal sekali. Kegagalan untuk berbuat demikian menyebabkan hujah itu tidak lagi terbuka di tahap rayuan (lihat ms 73A–B); *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124 dan *Gopal Das & Anor v Sri Thakurji & Ors* AIR 1943 PC 83 diikut.

(4) Perkataan-perkataan 'mana-mana pembeli' dalam s 340 Kanun tersebut merujuk kepada pembeli berikutnya dan bukan kepada pembeli pertama, justeru itu mewujudkan ketakbolehan disangkal tertunda yang memanfaatkan pembeli berikutnya. Hakmilik pembeli pertama boleh disangkal jika dicemari oleh satu atau lebih unsur yang menjadikan ia tak sah yang dinyatakan dalam s 340(2) tetapi mewujudkan kekecualian memihak kepada pembeli bona fide yang mengambil hakmiliknya daripada tuan punya berdaftar demikian. Pendwicabangan ini menunjukkan bahawa Parlimen berhasrat mengurniakan ketakbolehan disangkal tertunda dan bukan ketakbolehan disangkal segera. Hakim perbicaraan tersilap dalam bergantung kepada kes *Frazer v Walker* yang berkenaan tafsiran suatu peruntukan tertentu New Zealand yang berbeza pada asasnya dalam susunan kata daripada s 340 Kanun tersebut. Atas suatu tafsiran s 340 yang betul, pendaftaran yang diperolehi melalui pemalsuan tidak berkesan. Apabila s 340 dibaca secara keseluruhan dan dalam konteks dengan ss 292 dan 304 Kanun tersebut, adalah jelas bahawa pendaftaran tidak boleh berlaku tanpa suatu instrumen. Justeru itu, salah satu daripada cara untuk menentang pendaftaran adalah dengan mempersoalkan instrumen pindahmilik yang digunakan oleh tuan punya berdaftar bagi memperolehi hakmilik. Jika instrumen itu adalah palsu atau atas apa-apa alasan yang lain tidak mencukupi atau tak sah, hakmilik tuan punya berdaftar boleh diketepikan. Perbezaan di antara susunan kata s 42(iii) Kanun Tanah (Bab 138) yang lama dan s 340(2)(b) tidak menonjolkan apa-apa perbezaan sebagai akibat, meskipun s 42(iii) menyatakan dengan lebih jelas bahawa pendaftaran yang diperolehi melalui pemalsuan adalah tak sah (lihat ms 84E–F, 87D–E, 84C–D dan 85A–C, G–H); *Frazer v Walker* [1967] 1 AC 569 dibeza, *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 tidak diikut, *Krishnadas all Achutan Nair & Ors v Maniyam all Samykano* [1997] 1 MLJ 94 dan *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 diikut.]

Notes

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896.

For cases on proof of forgery of signature, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 283–285.

Cases referred to

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863 (refd)
Clement v Ellis (1934) 51 CLR 217 (refd)
Doe D Devine v Wilson (1855) 14 ER 581 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (not folld)
Frazer v Walker [1967] 1 AC 569 (distd)
Gian Singh & Co Ltd v Banque De L'Indochine [1974] 1 WLR 1234 (refd)
Gopal Das & Anor v Sri Thakurji & Ors AIR 1943 PC 83 (folld)
Kreditbank Cassel GMBH v Schenkers Ltd [1927] 1 KB 826 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94 (folld)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp [1986] 2 MLJ 124 (folld)
Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 (folld)
Narayanan Chettyar v Official Assignee, Rangoon AIR 1941 PC 93 (refd)
Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan [1959] MLJ 173 (refd)
Onassis & Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 (folld)
PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (folld)
Rejfek v McElroy (1965) 112 CLR 517 (refd)
Saminathan v Pappa [1981] 1 MLJ 121 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (refd)
Tan Chye Chew & Anor v Eastern Mining & Metals Co Ltd [1965] 1 MLJ 201 (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (folld)

Legislation referred to

National Land Code 1965 s 340
National Land Code (Penang and Malacca Titles) Act 1963
Land Transfer Act 1952 ss 62, 182, 183 [New Zealand]

Appeal from: Civil Suit No 22–401–89 (High Court, Pulau Pinang)

Lim Kean Siew (*Gerard Chan* with him) (*Lim Kean Siew & Co*) for the appellant.

Ghazi Ishak (*Mureli Navaratnam* with him) (*Ghazi & Lim*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court):

Facts and background

Boonsom Boonyanit, the appellant before us, is a Thai national. She resides in Thailand, but visited this country from time to time. During her

visits, she was always accompanied by her eldest son, Phiensak Sosothikul (PW2). She was — until the occurrence of those events to which we will refer in a moment — the registered proprietor of the land held under Lots 3606 and 3607, Mukim 18, in the Town of Tanjung Bungah, Pulau Pinang ('the land'). But she is no longer on the register. It is the respondent company which is at present the registered proprietor. This change in the ownership of the land occurred in the following way.

In late October 1988, one of its directors, Mr Fong Wah Tan (DW1), was approached by one Mr Lim Chan Hwa (DW2) of CA Lim & GE Tan Sdn Bhd, valuers and estate agents. DW2 asked DW1 if the respondent would be interested in buying two pieces of land having beach frontage. The land was identified as the property that was available for purchase. The asking price was RM30 per square foot. There was some negotiation after which the price was agreed at RM22 per square foot. Later, DW2 obtained an option in favour of CA Lim & GE Tan Sdn Bhd at the agreed price and produced it to DW1. The respondent company duly exercised the option through its solicitor, Mr Cheong Wai Meng and later entered into a sale and purchase agreement with the vendor. On completion of the purchase, a memorandum of transfer in respect of the land was purportedly executed by the appellant on 7 April 1989 and registered in the respondent's favour on 24 May 1989.

On 11 June 1989, an advertisement appeared in a Thai newspaper called 'Thairat'. It was placed by M/s Khor Ong & Co, a firm of solicitors in Butterworth. After setting out the description of the land, it called upon, inter alia, any heir of the appellant to communicate with the aforesaid solicitors. PW2 read the advertisement. His suspicions were aroused. He therefore got in touch with his mother's solicitors, M/s Lim Kean Siew & Co, to conduct investigations.

Inquiries made by the appellant's solicitors revealed the following:

(1) Someone calling herself 'Sun Yok Eng @ Boonsoom Boonyanit' had affirmed a statutory declaration on 18 June 1988 ('the first statutory declaration') stating that she was the owner of the said land and that she had lost the original title to it. The passport number of the declarant in the first statutory declaration appears as 'K/P Thailand No 000386'.

(2) The first statutory declaration was used to apply for and obtain a certified copy of the title from the appropriate authority.

(3) Mrs Boonsoom Boonyanit had affirmed a statutory declaration on 6 April 1989 ('the second statutory declaration') in which she declared that 'the names Mrs Boonsoom Boonyanit in my International Passport No N-033852 and Sun Yok Eng @ Boonsom Boonyanit in the said ACT (meaning the title to the land) in respect of the said property refer to the same and one person, that is Mrs Boonsoom Boonyanit'.

(4) The second statutory declaration was used to effect registration of the memorandum of transfer in the respondent's favour.

A It may be added, for completeness, that the documents of title to the said land was not lost as alleged in the first statutory declaration, but was, at all material times, in the appellant's custody.

Following the inquiries made by her solicitors, the appellant, after lodging a police report, instituted proceedings in which she claimed the B following relief:

(1) A declaration:

(i) that her right, title and interest in and to the land is not affected by the purported transfer to the respondent;

(ii) that the transfer in favour of the respondent is void ab initio; and C

(iii) that the appellant is the registered owner of the land.

(2) An order that the Registrar of Land Titles do:

(i) cancel the entries or memorials in the register of land titles in favour of the respondent; and

D (ii) restore the appellant's name as the registered owner of the said land.

(3) Costs.

(4) Damages.

(5) Such other relief as the court deems fit.

E

The basis of the appellant's claim for the foregoing relief appears in para (4) of her amended statement of claim which reads as follows:

(4) The plaintiff's claim against the defendant is for the recovery and reinstatement of all her right, title and interest in and to the said land and the removal of the defendant's name from the register of the land F titles on the grounds that the said transfer of 7 April 1989 was procured by forgery and/or fraud, particulars of which are set out below.

PARTICULARS

(a) The purported transferor of the said land was not the plaintiff.

G (b) The plaintiff did not dispose of the land nor authorized anyone to dispose of the same on her behalf.

(c) The plaintiff did not enter into any agreement with the defendant nor executed the said memorandum of transfer in favour of the defendant nor authorized anyone to do the same on her behalf.

H (d) The plaintiff did not affirm a statutory declaration dated 6 April 1989 to effect a change of name from Sun Yok Eng @ Boonsom Boonyanit to Mrs Boonsoom Boonyanit.

(e) The plaintiff is Mrs Boonsom Boonyanit holding Thai passport No D 080757 and not the purported transferor holding herself out to be Mrs Boonsom Boonyanit holding Thai passport No 033852 as I endorsed in the title deeds in respect of the said land.

(f) The original title deed has at all material times been in the possession of the plaintiff but a certified copy thereof was procured by fraud through a false declaration that the original title deed was lost.

It is clear from these averments that the essence of the appellant's pleaded case in the court below was that the respondent had acquired its title to the land on the strength of a forged instrument of transfer.

The case for the respondent appears sufficiently from the following paragraphs of its amended defence:

(4) The defendant denies that the said transfer of 7 April 1989 was procured by forgery and/or fraud as alleged in para (4) of the amended statement of claim and the particulars appended thereto and therefore denies that the plaintiff is entitled to the remedies sought.

(5) The defendant further states that if the said transfer was procured by fraud and/or forgery, which is denied, the defendant did not procure the said transfer by fraud and/or forgery and was not a party to the said alleged fraud and/or forgery.

(6) The defendant is a bona fide purchaser of the said land for value and acquired an indefeasible title in the said land through the completion of the sale and purchase agreement dated 15 December 1998 and/or the subsequent registration of the transfer thereof by the said Mrs Boonsoom Boonyanit (Thai Passport No 033852) in the defendant's favour.

(7) Further and/or alternatively, the defendant's title and interest in the said land and its proprietorship thereof was acquired for valuable consideration and in good faith and the plaintiff is accordingly not entitled to the remedies sought.

So much for the pleadings.

The appellant gave evidence at the trial of her action. She was shown the first and second statutory declarations as well as the impugned memorandum of transfer. She denied that she had executed these documents. She also denied that she had sold the land. Her passport was produced. It showed that she had been in Thailand at the material time. Her son, PW2, testified under cross-examination that the signature appearing on the impugned memorandum of transfer was not that of his mother's. He however identified her signature on certain other documents that are not the subject of challenge. Evidence was also adduced in the form of a certificate from the Royal Thai Consulate-General certifying that Passport No N 033852 was a forgery.

The evidence led on the respondent's behalf confirmed that the respondent had throughout acted by its solicitors. As far as the respondent was concerned, the sale was an arm's length transaction in which the vendor had been separately represented. The respondent did not, however, call the vendor's solicitor to give evidence. The position adopted on the respondent's behalf was that the burden of proof lay upon the appellant and it was for her to call the solicitor who attended to the transaction on behalf of the vendor.

The learned judge identified the following four issues as arising from the joinder disclosed in the pleadings:

(i) whether the appellant was the registered proprietor of the said land prior to its transfer to the respondent.

(ii) whether forgery, when raised in civil proceedings, had to be established beyond a reasonable doubt or whether it was sufficient to prove it on a balance of probabilities;

(iii) whether the memorandum of transfer in favour of the respondent was a forgery; and

(iv) if it was, then, whether the respondent had acquired an indefeasible title to the said land.

The learned judge resolved the first issue in the appellant's favour (see the High Court decision in [1995] 2 MLJ 863). There is a cross-appeal by the respondent against this finding. It may be conveniently disposed of at this stage as it was not pursued before us with any vigour. Indeed, En Ghazi did not even mention it in passing during his argument. Nor did he advance any reasons to show why the learned judge erred in holding that the appellant was the registered proprietor of the said land. Any difficulty which the learned judge encountered on the point was occasioned by a failure on his part to appreciate the interim measures taken to convert land tenure in Penang from the system of unregistered title to the Torrens system of registered title pursuant to the National Land Code (Penang and Malacca Titles) Act 1963. But it must be said in fairness to the learned judge that he carried out a meticulous examination of the evidence before determining the issue in the appellant's favour and we have been unable to detect any error on his part. The complaint in the cross-appeal that the learned judge ought not to have been prepared to accept proof of title upon a balance of probabilities is utterly devoid of merit. Once she produced the interim form of title issued to her by the appropriate authority, she proved ownership. It was then up to the respondent to call such evidence as it deemed necessary to rebut the prima facie case made out by the appellant. Needless to say that no such proof was forthcoming. The judge was therefore quite correct in accepting the evidence of the appellant on the point.

As regards the second issue, the learned judge held that the standard of proving forgery in civil proceedings was the same as that in a criminal case, namely, that it had to be established beyond reasonable doubt. Applying this test, he resolved the third issue by holding that the appellant had failed to prove beyond a reasonable doubt, that the signature of the vendor appearing in the impugned memorandum of transfer was not genuine. The learned judge went on to hold that even if the appellant had succeeded in meeting the required standard of proof, the respondent was a bona fide purchaser for value so that its title became indefeasible immediately upon registration. Accordingly, he resolved the fourth issue against the appellant.

Before us, Mr Lim has attacked the conclusions of the learned judge upon several grounds. En Ghazi has, with usual ability, sought to defend the judgment appealed against. The arguments of counsel raise important questions of law. So important, that it caused us to reserve judgment.

Was the issue of forgery regularly tried? A

Before we deal with this question, it is necessary to dispose of a matter that was a source of some concern when we heard argument. It is a point that also forms part of the respondent's cross-appeal. It was drawn to our attention by En Ghazi during argument. It has to do with the question of proving documents that were tendered by one side or the other at the trial. B

En Ghazi complained that the trial judge had ruled that the proof of each document tendered by the appellant was to be tested, not then and there, but only at the end of the trial. This, he said, placed him in a rather difficult position in dealing with each document produced by the appellant and her witnesses. If this was indeed what the learned judge directed, then, C it would mean that the issue of forgery had not been regularly tried, thus necessitating a retrial of the suit.

The learned judge's direction on the proof of documentary evidence is contained in the following passage of his judgment (at p 875F–I):

> At the outset of the case, when the court enquired why there was no agreed D bundle, Mr Ghazi replied that the defendant would not agree to most of the documents in the plaintiff's bundle. Hence, as neither party had sought an adjournment to identify and to compile an agreed bundle of the documents that they had agreed to, the court directed that since this was a long-standing case, it could nevertheless proceed and the parties could object to the admission of the documents concerned as and when they are tendered. E This was the approach I adopted as defendant's counsel did not specify the admission of which document in the plaintiff's bundle they had intended to object and thus the plaintiff would only be put on notice that she was required to call the maker thereof (or its attesting witness) as and when such objections are made on each individual document.
>
> It would thus be impermissible for either party (as the defendant here) F to select in their submission, only after the close of evidence, the admission of which document they would object to. This situation goes only to demonstrate the imprudence of insisting that trial could proceed in the absence of an agreed bundle.

In our judgment, the direction given by the learned judge and his conduct G of the case vis a vis the proof of documentary evidence was entirely proper. He did the best that he could in the circumstances in which he had been placed by the parties' failure to agree upon the proof of the documents tendered by the appellant. In view of his direction, it was certainly not open to the respondent to remain silent at the moment of production and H take the objection in final argument.

The law of evidence draws a distinction between the admissibility of a document and the mode of proving it. If a document is declared inadmissible by a statute, then, failure to object to the inadmissible document at the first available opportunity does not prevent the party adversely affected from raising the matter on appeal. Inadmissible evidence, I whether in civil or criminal proceedings, remains inadmissible despite any failure to object to its admission (see *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124).

A On the other hand, where, as in the present case, the complaint is directed, not at admissibility, but at the mode of proof, that is to say, the procedure by which a particular document is to be proved, objection must be taken at the earliest opportunity. Failure to do so results in the point being no longer open at the appellate stage.

B These propositions are supported by the authority of the Privy Council's decision in *Gopal Das & Anor v Sri Thakurji & Ors* AIR 1943 PC 83 at p 87, where Sir George Rankin, when delivering the advice of the Board said:

> C Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial.
> D

For these reasons, we are satisfied that the issue of forgery, as a question of fact, was regularly tried *from a procedural standpoint* and that there is no substance in the respondent's complaint that forms part of its cross-appeal.

E *The issues in the appeal*

We now turn to the issues that have arisen in this appeal. In logical sequence, these are:

(1) whether the appellant had established her case in accordance with F the standard required by law; and

(2) if the first issue is answered in the affirmative, then, whether the respondent has acquired an indefeasible title to the said land.

The first issue

G In respect of the first issue, two subsidiary questions arise for resolution. They are as follows:

(1) Did the learned judge direct himself correctly upon the standard of proof that is required to prove forgery in a civil cause?

H (2) Was there judicial appreciation of the evidence led at the trial?

The standard of proof

The learned judge, after a discussion of the relevant authorities on the proof of fraud in civil proceedings, held that the allegation of forgery had I to be established by the appellant beyond a reasonable doubt. This is how he put it (at pp 878I and 879A–B):

> Neither counsel for the parties herein nor the court is able to locate any Malaysian authority concerning the probative burden of proof required in cases of forgery. Be that as it may, as forgery involves a high element of

> fraud, and is indeed, a species of fraud under common law, with both being criminal in nature, I am of the considered opinion that he who alleges forgery should be required to discharge the same onerous probative burden of proof as was established in *M Ratnavale* [*M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371] and *Chu Choon Moi* [*Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34]. I therefore hold that that is the probative burden or requisite standard of proof the plaintiff here would have to discharge to prove that forgery had been committed on P8, being proof beyond reasonable doubt and not proof on the balance of probability, which — in lighter vein and unorthodox language — could perhaps be expressed as proof on the balance of curial suspicion based on indeterminate or inexact evidence.

Mr Lim has argued that this constitutes a misdirection by the learned judge upon the standard of proof. He submitted that the learned judge placed too high a burden upon the appellant because an allegation of forgery in civil proceedings need only be established on a balance of probabilities.

We consider these submissions to be well-founded. But, before we state our reasons for accepting Mr Lim's argument, we consider it appropriate to identify and discuss the rules that operate in this area of adjectival law.

Now, it is a general rule of the common law that, in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. The general rule finds expression in the judgment of the High Court of Australia (Barwick CJ, Kitto, Taylor, Menzies JJ in *Rejfek v McElroy* (1965) 112 CLR 517, a case of fraudulent misrepresentation).

The common law of Malaysia has provided an exception to this rule in one case alone. Where fraud is alleged in civil proceedings, it must be proved beyond a reasonable doubt. The exception rests upon the following observation of Lord Atkin in *Narayanan Chettyar v Official Assignee, Rangoon* AIR 1941 PC 93 at p 95:

> There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. *Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.* The High Court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture. (Emphasis added.)

This passage was applied by Rose CJ in the Singapore High Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] MLJ 173 which in turn was applied by the former Federal Court in *Tan Chye Chew & Anor v Eastern Mining & Metals Co Ltd* [1965] 1 MLJ 201. It has also been applied by our courts in later cases. See, for example, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, per Abdul Hamid FCJ (as he was then) at p 84.

The Privy Council has recognized the departure made by our common law upon the question of proof of fraud in civil proceedings. In *Saminathan v Pappa* [1981] 1 MLJ 121 at p 126, Lord Diplock when delivering the advice of the Board said that, 'The onus of proof of fraud in Malaysia is proof beyond reasonable doubt.'

We pause to observe that the dictum of Lord Atkin in *Narayanan Chettyar* has not received universal acceptance.

In *Rejfek*, the High Court of Australia rejected the Atkin test for reasons that appear in the following passage of the judgment:

> This court decided in 1940 in *Helton v Allen* (1940) 63 CLR 691 that in a civil proceeding, facts which amount to the commission of a crime have only to be established to the reasonable satisfaction of the tribunal of fact, a satisfaction which may be attained on a consideration of the probabilities. This decision was arrived at after due consideration of the dictum of Lord Atkin in the case of *New York v Heirs of Phillips (dec'd)* [1939] 3 All ER 952 at p 955, and a careful examination of its meaning and its acceptability. *Helton v Allen* thus established that the criminal standard of proof is inappropriate to the determination of any such fact in any civil action tried in any court in Australia where there are no statutory provisions to the contrary. That decision is binding on all courts in Australia unless and until there is a precise decision to the contrary by the court or by the Privy Council.
>
> However, the Full Court of Queensland in *King v Crowe* [1942] St R Qd 288 appears to have thought that a sentence in the judgment of the Privy Council delivered by Lord Atkin in *Narayanan Chettyar v Official Assignee of the High Court, Rangoon* was a decision to the contrary of this court's decision in *Helton v Allen*; and, accordingly, did not follow that case.
>
> But, in our opinion, it is abundantly clear that the sentence in the judgment delivered in *Narayanan Chettyar v Official Assignee of the High Court, Rangoon* was obiter: the preceding and the following sentence of the judgment make that evident. The question of the appropriate standard of proof does not appear to have been considered by their Lordships in that case as a matter arising before them nor were any authorities discussed; in particular, the decision of this court in *Helton v Allen* does not appear to have been considered.
>
> Further, the validity of the proposition of law which that sentence in the judgment of the Privy Council appears to assert was examined by Davidson J in *Hocking v Bell* (1944) 44 SR (NSW) 468 at p 478 in the course of a careful and full review of the relevant authorities. The judgment of Davidson J as to the standard of proof in a civil proceeding was expressly accepted by Latham CJ and Dixon J (as he then was) in that case on appeal to this court: *Hocking v Bell* (1945) 71 CLR 430 at pp 464, 500. Although the course taken by the other justices participating in that appeal did not call for any pronouncement by them on the point, there is nothing in any of the reasons of those justices to suggest disapproval of the judgment of Davidson J in presently relevant respects. Dixon J (as he then was) expressed his clear opinion that 'the solid body of authority against introducing the criminal standard of persuasion into civil causes cannot be shaken by the unconsidered statement of Lord Atkin in the case from Allahabad' being *Narayanan Chettyar v Official Assignee of the High Court, Rangoon.*

The proof of forgery in civil proceedings, unlike fraud, comes within the general rule earlier adverted to. That it need only be established on a balance of probabilities was laid down as long ago as 1855 by the Privy Council in *Doe D Devine v Wilson* (1855) 14 ER 581, where Sir John Patteson, when delivering the advice of the Board said (at p 592):

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case, the onus of proving the genuineness

> of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case, the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

There are two comments which we make upon the law expounded in the foregoing passage.

First, the reference by the Privy Council to the trial of the issue of forgery by a jury applies with equal force to a trial of the identical issue by a judge sitting alone. In the latter case, a direction on the relevant law administered to himself by a judge as trier of both fact and law must be treated as a direction by a judge to a jury. A misdirection by a judge on the law is therefore equated to a misdirection to a jury.

Second, our researches have not shown any subsequent case where the passage quoted above was dissented from. Neither has our attention been drawn by counsel for the respondent to any criticism of the case by academic writers. On the contrary, we find that the case has been consistently applied by the High Court of Australia and noted by the editors of Dr Cross' work on *The Law of Evidence* (Australian edition), as well as the editors of *Woodroffe and Ameer Ali on The Law of Evidence* (16th Ed) with no adverse comment. We are, therefore, of the view that the proposition formulated by the Privy Council in *Doe D Devine v Wilson* — having stood unchallenged for more than a century — is, and remains, good law.

Further, our apex court has, independently of the advice of the Board in *Doe D Devine v Wilson*, held that forgery when raised in a civil proceeding need only be proved on a balance of probabilities.

In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 188, Anuar J (as he then was) said:

> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt, and *Sykt Perkapalan Timor v United Malayan Banking Corp Bhd* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care, but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities, and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Sykt Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218 where at p 220 the learned judge said:
>
> > 'In this case, although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged

A by the said Awang @ Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.'

B We are therefore of the opinion that the learned judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

Since the approach adopted by the trial judge in the present case is against well-established authority of high repute, as well as binding precedent, we would answer the first of the two subsidiary questions under the first issue C in the negative. In other words, the learned judge did not apply the standard of proof required by law in order to determine whether the appellant had established her allegation of forgery.

Appreciation of evidence

D It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned E with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

F In the present case, it was incumbent upon the learned judge to evaluate the evidence of the parties and their witnesses upon the critical issue of forgery and to either accept or to reject the testimony of such of them as he considered to be truthful or untruthful, as the case may be. No doubt, the learned judge, in his written judgment, carefully set out the G substance of the evidence of each of the several witnesses who had testified before him. But, nowhere in his judgment did the learned judge express any view upon the credibility of the appellant or her witnesses. He did not say that he disbelieved them or any of them. Equally, he did not say that he believed some or all of them. There was simply no evaluation at all.

H Further, the learned judge classified the appellant's evidence as circumstantial. It was not. The evidence in question was direct, not circumstantial. In our view, Mr Lim, with justification, complained about the following passages in the judgment of the learned judge (at pp 880I–881H):

I The other point of material consideration is that, neither Arifin bin Awang, Penolong Pentadbir Tanah Daerah, Seberang Prai Tengah, Bukit Mertajam who attested the transfer dated 7 April 1989 (P8) nor the solicitor from M/s Khor Ong & Co who represented Mrs Boonsom Boonyanit in the said transfer was called to testify as to whether the plaintiff was the transferor/vendor who signed P8. Considering the heavy burden placed on the plaintiff's shoulders, it is insufficient merely to assert that that signature was not hers

and that she was not in Malaysia at the material time, but she ought to have called a signature expert and En Arifin Awang who attested P8 or the lawyer from M/s Khor Ong & Co to clearly and conclusively prove that she was not the person who signed as transferor in P8. Regrettably, this onus she had failed to discharge within the standard required in *M Ratnavale* [*M Ratnavale v S Lourdenadin, M Mahadevan v Lourdenadin* [1988] 2 MLJ 371].

Due to the nature and circumstances of the sale transaction, it is unreasonable for the court to expect the defendant's counsel to challenge the plaintiff that she did sign P6, P7, D15 or P8. The court has to be mindful of the common ground between the parties that from the date of execution of D15 until the completion of the sale, the vendor and purchaser were represented by different solicitors; P8 was attested by the Penolong Pentadbir Tanah Daerah, En Arifin bin Awang, and was executed about eight months after D15 was signed, sealed and delivered, and a total sum of RM1,865,798 was paid to the vendor by the defendant for the said properties. It is also obvious that by virtue of P7, M/s Khor Ong & Co had at the material time held out that they represent the registered proprietor of the said properties, one Mrs Boonsoom Boonyanit, also known as Sun Yoke Eng @ Boonsom Boonyanit.

In conclusion, my view is that the sum total of the plaintiff's evidence may at the very most constitute circumstantial evidence, which may be sufficient to show on the balance of probability that her signature had been forged, but the nature of such evidence, short of independent affirmative evidence, is insufficient to found proof beyond reasonable doubt, of the falsity of the signature per se in P8. This surely is the crucial element of proof required when one alleges forgery, as forgery by its very nature, essentially concerns signatures rather than alibi of signatories — the focus in martialling [sic] evidence to prove forgery should not be misplaced. Be it noted that, in arriving at my decision, I have adopted solely the beyond reasonable doubt test, although I am of the view that the plaintiff would have failed to establish forgery even had I applied the preponderance of probability test as in *Bater v Bater* [1951] P 35, as they had not called any of the vital witnesses aforesaid. (Emphasis added.)

Counsel for the appellant drew our attention to the decision of the Privy Council in *Gian Singh & Co Ltd v Banque De L'Indochine* [1974] 1 WLR 1234. He read the following passage (at pp 1237–1238 of the report) from the opinion of Lord Diplock, who delivered the advice of the Board which seems apposite to the instant case:

At the trial in the High Court before Chua J, Balwant Singh gave evidence that he had not signed the certificate and that what purported to be his signature was a forgery. His own passport was produced. Its authenticity was not in doubt. It showed that he had not left Singapore at any time after 26 April 1967. More important, it bore the date of issue, 18 September 1964, whereas on the certificate, the date of issue of passport No E–13276 is stated by the signatory to be 11 November 1964. The evidence of the assistant controller of immigration was that 'it is not possible for another passport issued on another day to bear the same number'. The inference is therefore that the passport No E–13276 handed to the beneficiary by Mr Chew was itself a forgery.

Chua J, however, found Balwant Singh to be an unsatisfactory witness. On a number of matters, his evidence conflicted with that of the manager of the issuing bank, and where this was so, the judge preferred the evidence of the latter. He also disbelieved Balwant Singh's story that he had not signed the certificate, though here, there was no direct evidence to the contrary. His reasons for rejecting this part of Balwant Singh's evidence were: (1) that no handwriting expert had been called to say that the signature on the certificate was a forgery; (2) that the certificate was on the customer's letter-head and Balwant Singh was not able to explain how this came about; and (3) that he, the judge himself, thought the signature on the certificate was 'much like' Balwant Singh's signature on his genuine passport and on the application for the documentary credit.

The Court of Appeal (comprising Wee Chong Jin CJ, Tan Ah Tah J and Choor Singh J) unanimously reversed the finding of fact of Chua J that the signature on the certificate was not a forgery. It has been contended before their Lordships that the judge's finding depended upon his assessment of the credibility of Balwant Singh and that an appellate court was not entitled to reverse this finding. Their Lordships agree that an appellate court is seldom justified in holding that the trial judge was wrong in disbelieving evidence given by a witness whom he had an opportunity of hearing and observing in the witness box — an advantage which the appellate court does not share. *But, in the instant case, the only direct evidence as to whether the signature on the certificate was genuine or not was that of Balwant Singh.* There was no evidence which conflicted with it except the judge's own impression that the signature on the certificate was much like a specimen of Balwant Singh's signature which was admittedly genuine. This, however, is a common feature of successful forgeries, and it is notoriously dangerous for judges, in the absence of expert evidence, to rely upon their own impression as to whether two signatures are by the same hand. Nevertheless, if there had been no circumstantial evidence to support the bare denial by Balwant Singh that he had signed the certificate, it might well have been improper for the Court of Appeal to reverse the judge's finding. In their Lordships' view, however, there was powerful circumstantial evidence corroborating the direct evidence of Balwant Singh which it is clear the judge had overlooked in making up his mind as to the credibility of Balwant Singh's evidence on the issue of forgery. (Emphasis added.)

The failure of the learned trial judge, in the passage in his judgment earlier quoted, to recognize the distinction between direct and circumstantial evidence — a distinction so elementary and fundamental to the law of evidence — is, in our judgment, a serious misdirection that has occasioned a miscarriage of justice in this case. He treated the appellant's absence from Malaysia at the material time to amount to an alibi, having no bearing upon the issue of forgery. In this he was plainly wrong. That absence, coupled with the unchallenged evidence that the passport number appearing in the impugned documents belongs to a forged passport, in our view, constitutes powerful circumstantial evidence in support of the appellant's assertion that she never executed the relevant instrument of transfer. The denial by the appellant that the signature of the vendor appearing in the impugned memorandum of transfer was not hers was not contradicted by the evidence from the respondent's witnesses.

Consequently, the learned judge ought to have concluded that the appellant had brought home the allegation of forgery to a high standard of conviction.

There are two other matters that arise from the judgment of the learned judge and call for comment. First, in the passage which we have reproduced from his judgment, the judge relied on the failure of the appellant to call Arifin bin Awang, the Penolong Pentadbir Tanah who attested the impugned memorandum of transfer and the attending solicitor from M/s Khor Ong & Co as her witnesses to prove her case.

Mr Lim has argued that the learned judge was clearly wrong in this respect because there was no obligation on the appellant to call these persons. He says that the evidence led by the appellant upon the issue of forgery was sufficient and that it was up to the respondent to call these two individuals if it wished to disprove the appellant's case.

We are in agreement with these submissions. The appellant had, at the close of her case, by means of cogent evidence, both direct and circumstantial, brought home the allegation of forgery. There was no rebuttal from the respondent upon any of the salient points raised by the appellant. Yet, it appears that there was no recognition of these matters by the learned judge anywhere in his judgment. The language employed by him makes it plain that he drew an adverse inference against the appellant for her failure to call the two persons aforementioned — the Penolong Pentadbir Tanah and the attending solicitor for the purported vendor — because of what he perceived to be the higher standard of proof that the law placed upon the appellant.

Second, the learned judge found against the appellant on the footing that she ought to have called a 'signature expert' (we think he meant a handwriting expert or qualified document examiner) to prove her case instead of relying on what he erroneously perceived to be an alibi. In this he was wrong, because he failed to appreciate that there was direct evidence from the appellant's son that the signature appearing on the impugned instrument of transfer was not that of the appellant. This evidence came as a result of cross-examination by counsel for the respondent. It was then not suggested to the witness while still under cross-examination that he was wrong or that he was unfamiliar with his mother's handwriting or usual signature.

That the learned judge's expectation of proof upon the issue to be forthcoming from an expert was misplaced is sufficiently demonstrated by the following observation by Hashim Yeop A Sani J (as he then was) in *PP v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 at p 66:

> It is settled law that evidence by a handwriting expert can never be conclusive because it is only opinion evidence — see *Ishwari Prasad v Mohd Isa* AIR 1963 SC 1728.
>
> The assessment of evidence of handwriting experts was also dealt with in *Indar Datt v Emperor* AIR 1931 Lah 408 at p 413. In that case, *Re B Venkata Row* ILR 36 Mad 159 was cited, and also a quotation from Dr Lawson's work on *The Law of Expert and Opinion Evidence*, which runs as follows:

> 'The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed however that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence.'

Although these remarks were made in the context of a criminal trial, they are, in our view, of universal application.

We are conscious that as an appellate court, we have not had the opportunity of seeing and hearing the witnesses who gave their evidence at the trial. But the learned judge, for the reasons we have thus far given, did not take advantage of the benefit that was available to him. He did not, as we earlier observed, reject the appellant's evidence as being untrue. He merely said that the evidence adduced by her did not establish the allegation of forgery either beyond reasonable doubt or even upon a balance of probabilities. His error in this instance was occasioned by his failure to judicially appreciate the nature and quality of the evidence before him and to take advantage of the audio-visual opportunity made available to him by the law.

We are equally conscious of our duty and function as an appellate court. The present appeal is by way of rehearing, and we are obliged to exercise those statutory powers conferred upon us in order to achieve substantial justice. And in the performance of the task entrusted to us by Parliament, we remind ourselves of what was said by Lord Pearce in his dissent in *Onassis & Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour. But the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

We are satisfied that if the learned judge had directed himself correctly upon the standard of proof and judicially appreciated the evidence before him, he would have come to the conclusion that the appellant had established her case and proved that the impugned instrument of transfer was a forgery. The direct evidence of the appellant is neither inherently incredible nor inherently improbable. Indeed, it is, as we have observed earlier, corroborated by the evidence of surrounding circumstances. As such, in the present instance, we will be in dereliction of our statutory duty if we decline to intervene and substitute our views for those expressed by the judge.

For the reasons given, we would answer the second subsidiary question in the negative and resolve the first issue in the appellant's favour. A

The second issue: deferred or immediate indefeasibility?

There is no dispute between the parties as to the relevant written law that is to be applied to the facts of this case. It is the National Land Code (Penang And Malacca Titles) Act 1963. By reason of its provisions, the certainty of title is to be determined by reference to the National Land Code 1965 ('the Code'). However, the question that has arisen for acute decision in the present appeal is one that, so far as we are aware, has not been decided by any court in this country. We are, therefore, compelled to treat this as a case of first impression upon the important question whether the Code creates immediate or deferred indefeasibility in favour of a registered proprietor of land. B C

As we observed very early in this judgment, the learned judge held that even if the instrument of transfer in question was forged, the respondent nevertheless obtained an indefeasible title to the said land. He therefore ruled in favour of immediate indefeasibility. In coming to this conclusion, the learned judge rejected the following opinion expressed by Dr David Wong at p 361 of his work, *Tenure and Land Dealings in Malay States*: D

> Forgery as a ground for vitiating a registered title, as set out in s 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v Walker* [1967] AC 569 applies. In *Choo Loong v Lip Kwai Kow* (1930) 7 FMSLR 213, a person by a trick induced an illiterate proprietor of land to hand her grant (document of title) to him, and created a registered charge in favour of another person by way of a forgery. The proprietor succeeded in this action for an order to have the charge cancelled. In *Ong Lock Cho v Quek Shin & Sons Ltd* [1941] MLJ 88, a registered proprietor entrusted his document of title to his solicitor for the purpose of creating a charge. A clerk in the solicitor's firm by forgery created a different charge in favour of another person. It was held that the forged charge was a nullity and must be set aside. These two cases were decisions under s 42 of the former FMS Land Code which, as has been noted, was substantially similar to the present s 340. E F G
>
> Even prior to the former FMS Land Code, when the early Registration of Titles legislation in its principal 'indefeasibility' provision only specified 'fraud' and 'misrepresentation' as the exceptions thereto, the courts in the Malay States had recognized forgery as a ground for defeating a registered title. In one of these decisions, namely *Ong Lian v Tan Eng Jin* (1917) 1 FMSLR 325, it was held by the Court of Appeal that a bona fide purchaser for value, taking from a proprietor who had come onto the register by registration of a forged transfer, acquired an indefeasible title. The protection for subsequent purchasers is now clearly provided for by the present s 340(3). H
>
> It will be realized that 'forgery' under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act (Cap 276) also expressly sets out 'forgery' as an exception to indefeasibility, but places 'forgery' side by side with 'fraud' subject to the same limitation, viz, that for I

A a registered title to be vulnerable in either case, the proprietor (or his agent) must be a party to or have colluded in the 'fraud' or 'forgery'. This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be
B an innocent purchaser for value.

The learned judge also rejected a similar view expressed by Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia — Cases and Commentary* (1st Ed) and by Judith Sihombing in the second edition of her work *National Land Code — A Commentary*. His reasons for this rejection may be
C conveniently summarized as follows:

(1) The Privy Council in *Frazer v Walker* [1967] 1 AC 569 had resolved the conflict of opinion that had arisen between its earlier decisions in *Gibbs v Messer* [1891] AC 248 and *Assets Co Ltd v Mere Roihie* [1905] AC 176 by ruling in favour of immediate indefeasibility;

D (2) Section 340 of the Code is at variance with its precursor, s 42 of the FMS Land Code (Cap 138) on the effect of forgery upon the title of a registered proprietor. Whereas para (iii) of s 42 expressly provided that registration obtained by forgery 'shall be void', s 340(2)(b) of the Code merely says that the title or interest of a registered proprietor shall not be indefeasible 'where registration was obtained by forgery'.
E Therefore, registration obtained by forgery is not void.

(3) The Federal Court in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 correctly held that registration under the Code conferred a title that was immediately indefeasible. The criticism of this decision by Judith Sihombing in the second edition of her work is unwarranted because
F there is a distinction between a forged instrument of transfer and the effect of registration of such an instrument.

(4) The proviso to sub-s (3) of s 340 of the Code which reads:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration,
G or by any person or body claiming through or under such a purchaser.

protects an immediate purchaser who obtains registration of his title or interest under a forged instrument because of the phrase 'any purchaser' appearing therein. The words 'any purchaser' must include the first purchaser/transferee who gets onto the register document of
H title in consequence of a forged instrument.

(5) The appellant had asked for a declaration which is essentially a discretionary form of relief. The respondent was not a party to the fraud that resulted in the forgery of the impugned transfer. Therefore, discretion should be exercised in its favour and the relief should be refused. Unless the Code expressly declared a transfer to be void (as
I did s 42(iii) of the Land Code), the principles of common law ought to apply.

The learned judge then concluded in the following terms (at p 887F–G):

> For the above reasons, I hold that even had I found that forgery had been proved beyond reasonable doubt, the defendant is nevertheless protected and has acquired indefeasible title over the said properties by virtue of the proviso in s 340(3) of the National Land Code. Thus, the law on forgery obtaining in other Torrens systems is also applicable in our Torrens system. It is true that registered landowners should be protected from being divested of their registered interest through fraud or forgery, yet it is also necessary, for the economic well-being of the nation, to retain the confidence of prospective innocent purchasers of landed property.

Counsel for the appellant has submitted that the judge misdirected himself upon the law relating to the indefeasibility of title. It is Mr Lim's argument that the academic writers with whom the learned judge found himself in disagreement are correct in the views expressed by them. The learned judge, on the other hand, was wrong in relying — as did the Federal Court in *Doshi* — upon the pronouncement of the Judicial Committee in *Frazer v Walker* to hold that registration conferred immediate indefeasibility under our version of the Torrens system. The decision in *Frazer* turned upon the construction of the particular provision in the New Zealand statute that governed the case. That provision is constructed in language that is fundamentally different from s 340 of the Code. It is therefore wrong to treat the decision in *Frazer* as concluding without question the meaning that is to be attached to the Torrens doctrine of indefeasibility housed in the Code. On a proper construction of s 340, a registration obtained by forgery is null and void and of no effect. The words 'any purchaser' appearing in the proviso to s 340(3) refer to a subsequent and not to an immediate purchaser. The indefeasibility conferred by the Code is therefore deferred and not immediate.

Encik Ghazi, in supporting the judgment appealed against, argued that the words of the proviso should be given their plain and ordinary meaning. Parliament intended for there to be immediate indefeasibility. Hence, the use of the phrase 'any purchaser'.

Having considered the rival contentions advanced before us and having examined the law upon the subject, we are persuaded that there is merit in the submissions made by Mr Lim. Our reasons in accepting his arguments in preference to the views expressed by the learned judge are as follows.

First, we are of the opinion that the proper approach is to interpret s 340 of the Code as a whole, uninfluenced by any judicial or academic comment upon its effect. When read as a whole, the section makes it clear that, save in the limited cases enumerated in its second subsection, the title of a registered proprietor shall be indefeasible; that is to say, that it cannot be impeached. But such title, in the words of the legislature, 'shall not be indefeasible' in each of the instances set out in the second subsection to s 340. This means that in each situation envisaged by the Code under s 340(2), the title of a registered proprietor shall be defeated or, in other words, liable to be set aside.

Second, registration under the Code is not an abstract concept. The Code (in Pts 13–17) after identifying the kinds of dealings that may be had under it, goes on to specify (in Pt 18) the method by which each dealing

may be secured by registration. Section 292 sets out the instruments that may be registered, while s 304 describes, inter alia, the manner in which registration is to be effected. We find that a reading of the relevant provisions under Pt 18 of the Code makes it amply clear that there cannot be any registration without an instrument. It follows that the trial judge was wrong in drawing a distinction between a forged instrument and the effect of its registration. The decision in *Doshi* which the judge relied upon in making the distinction must, of course, be addressed separately. But what calls for attention is the fact that one of the methods that may be employed to defeat the title of a registered proprietor is impugning the very instrument of transfer by means of which he obtained his title. If, on the facts of a given case, it is demonstrated to the satisfaction of the court that the particular instrument was forged, or was, for some other reason, insufficient or void, then, the title of the registered proprietor may be set aside. This rather elementary principle was unfortunately overlooked by the learned judge.

Third, it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. The extent to which statute has intervened in the case of a registration of title obtained by means of a forged instrument is a matter that we will deal with separately at a later stage. For the present, it is sufficient to note that there are passages in the judgment of the learned judge which are certainly open to the interpretation that he regarded the effect of forgery under s 340(2)(b) of the Code to merely render the relevant instrument voidable. And he appears to have reached that conclusion based upon his impression that s 340(2)(b) is differently constructed from its precursor. In this, the judge was clearly in error. As pointed out by the Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94, the difference in language between these two sections does not result in any difference either in meaning or consequence. Accordingly, we are of the opinion that the difference in language between the two provisions, namely, s 42(iii) of the Land Code (Cap 138) and s 340(2)(b) does not produce any difference in consequence. No doubt, the former provision expressly declared that registration obtained, inter alia, by forgery 'shall be void', whereas the latter does not. But what the latter does is to render defeasible, registration obtained by a forged instrument. Defeasibility is occasioned in this instance because a forged instrument is a nullity, incapable of conferring any right, interest or title in favour of the acquirer of immovable property.

It follows from what we have said in the preceding paragraph — and this is the fourth reason we advance for disagreeing with the learned judge — that s 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words 'any purchaser' appearing in the proviso to s 340(3)

do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s 340 of the Code. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

In our judgment, the learned judge was wrong in applying the decision of the Privy Council in *Frazer v Walker* to support the conclusion that under the Code, an acquirer of land who places himself upon the register by means of a forged document obtains an immediately indefeasible title if he is a bona fide purchaser for value. The decision in *Frazer* turned upon the meaning to be attached to certain provisions of the Land Transfer Act 1952 of New Zealand, in particular ss 62, 182 and 183 thereof which read as follows:

> 62 Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, [but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963], the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, —
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> (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
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> (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
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> (c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.
>
> 182 Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.
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> 183(1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the

> estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.
>
> (2) This section shall be read subject to the provisions of ss 77 and 79 hereof.

The New Zealand provisions giving effect to the Torrens doctrine of indefeasibility are therefore fundamentally different from s 340 of the Code. It follows that cases decided under the New Zealand statute must not be treated as concluding the effect of indefeasibility under our law. We do not propose to enter upon a detailed analysis of the differences between the New Zealand provisions and those in the Code. Suffice to say that the sections of the Land Transfer Act 1952 reproduced above, when properly construed, create immediate idefeasibility in favour of an acquirer of land in New Zealand. On the other hand, s 340 of the Code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor. This bifurcation makes it clear that Parliament intended to confer deferred and not immediate indefeasibility.

That brings us to the rather controversial decision in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 at p 88 where Gill CJ (Malaya) appears to have made the following pronouncement which appears to favour the doctrine of immediate indefeasibility under the Code:

> I am also of the opinion that third parties can acquire rights where a contract is merely unenforceable and not illegal. Assuming that the loan agreement was illegal so that for that reason the transfer from Chooi Mun Sou to equitable nominees was void, and assuming that that transfer was also void because of the falsity of the attestation clause, registration of the transfer from equitable nominees to the respondent was effective to vest title in him as a registered proprietor *notwithstanding that he acquired his interest under an instrument that was void* (see *Frazer v Walker* [1967] 1 All ER 649). In *Breskvar v Wall* (1972) 46 ALJR 68 at p 70, Barwick CJ said:
>
> > 'The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer v Walker* (supra) of the decision of the Supreme Court of New Zealand in *Boyd v Mayor of Wellington* [1924] NZLR 1174 at p 1223, now places that conclusion beyond question.' (Emphasis added.)

It is plain that the learned Chief Justice of Malaya relied upon the decision in *Frazer* to arrive at his conclusion. As we have pointed out, the Privy Council in that case was considering statutory provisions that bear as much similarity to those in the Code as cheese does to chalk. The observations of Gill CJ (Malaya) in *Doshi v Yeoh Tiong Lay* above-quoted, made, as they were, without an analysis of s 340 of the Code and an appreciation of the material differences between the New Zealand statute and our written law must be regarded as per incuriam. It therefore comes as no surprise that authors of Malaysian texts upon the subject have unanimously rejected the views expressed by the learned Chief Justice of Malaya in the foregoing passage.

In our judgment, the following opinion expressed by Dr Visu Sinnadurai in his work entitled *Sale and Purchase of Real Property in Malaysia* accurately summarizes the position that obtains under the Code:

> In Malaysia, it is submitted that under s 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a bona fide purchaser.

We would add that the following obiter dictum of Hashim Yeop A Sani J (as he then was) in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53 at p 54 reasonably supports the view held by such academic writers as Dr David Wong and Judith Sihombing in their respective works which is to the like effect as that expressed by Dr Visu Sinnadurai:

> What the appellant is claiming is in fact the protection of s 340 of the National Land Code. The doctrine carried in s 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Subsection (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. This provision deals with what is called 'deferred indefeasibility' about which we are not presently concerned.

We express our agreement with the foregoing interpretation placed upon s 340 of the Code by this eminent judge. We also consider the following passage in the judgment of Dixon J in *Clements v Ellis* (1934) 51 CLR 217 at p 237 (a decision under the Transfer of Land Act 1915 of Victoria) to be a more appropriate description of the kind of indefeasibility that obtains under the Code:

> The principle, in my opinion, is that a prior registered estate or interest, for the removal of which from the register there is no authority but a forged or void instrument, is not destroyed unless afterwards a person, who, according

A to the existing condition of the register is entitled to do so, gives a registrable instrument which is taken bona fide for value and registered. The justification for destroying an existing legal estate or interest, which has already been duly established upon the register, is, in other words, found only in the necessity of protecting those who subsequently deal in good faith and for value in a manner, which, upon its face, the register appears to authorize, B and who then obtain registration.

We therefore resolve the second issue in the appellant's favour and hold that the respondent did not obtain an indefeasible title to the said lands.

The result

C For the reasons that we have given in this judgment, the appeal succeeds. The judgment and orders made by the judge are hereby set aside. In their stead, there shall be judgment for the appellant in terms of prayers (1) and (2) of her amended statement of claim. The declarations and orders sought by her in these prayers are accordingly granted. The orders sought D in prayer (2) shall take effect forthwith. However, her claim for damages is denied. The costs of this appeal and all proceedings in the court below shall be taxed and be paid by the respondent to the appellant. The cross-appeal fails and is, for the reasons already given, also dismissed with costs. Lastly, by way of consequential order, we direct that the respondent do forthwith surrender the duplicate issue document of title to the said lands E to the appropriate authority for cancellation.

Before we conclude, we wish to thank both counsel for their assistance during argument. We must also express our thanks to the several academic writers whose works have proved to be of immense value to us during our deliberations in this matter. It is unusual for a court to single out any F particular author or academic. But we propose to make an exception in this case. The works by Dr David Wong and Judith Sihombing have been of particular assistance, although we have found ourselves being unable to agree with all that they may have said upon the subject.

G *Appeal allowed.*

Reported by K Tang-Wai

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